IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

SEAN MURPHY and CORRIE MURPHY, husband and wife, and the marital community composed thereof; and PETER MURPHY, Respondents and, Cross Appellants, v. BENJAMIN C. ARP and GWEN E. ARP, husband and wife, and the marital community composed thereof; and ARP, LLC, a Washington limited liability corporation, Appellants and Cross Respondents.	)	No. 61714-1-I UNPUBLISHED OPINION FILED: June 1, 2009

Ellington, J. — This is a case about slander of title. We affirm the trial court's conclusion that Benjamin Arp and Arp, LLC slandered the title of property belonging to Sean and Corrie Murphy, and affirm the resulting damages and fees awards to the Murphys. We agree with the Murphys that their second claim for tortious interference with a contractual relationship did not fail for failure of proof of damages.

BACKGROUND

In 2003, Benjamin and Gwen Arp began to explore the possibility of subdividing their property into two lots. The property was not big enough to meet subdivision requirements under the city code, so Benjamin Arp approached neighbor Sean Murphy[1]

to see if he might be interested in selling a small portion of his property (about 360 square feet). Murphy was willing to consider the deal and the parties discussed an option agreement. The Arps' attorney prepared a letter of intent memorializing the discussions, which all parties signed on February 29, 2004. The letter contained none of the elements of a contract, and stated, "Nothing contained herein shall be construed as a contract or binding agreement. Completion of this transaction is subject to negotiation and execution of a mutually acceptable Option."[2] Within a few months, however, the Arps realized they needed to acquire significantly more additional property than previously contemplated. They abandoned the project as either impossible or impractical.

On June 19, 2006, Sean Murphy and his new wife, Corrie, listed their house for sale with agent Shelly Miller. They planned to accept bids at Miller's office on Friday afternoon, June 23, 2006. Shortly before the scheduled bid process, Benjamin Arp called agent Miller and asserted that he had a letter of intent signed by Sean Murphy granting the Arps an interest in the Murphy property, including "an option to purchase the property and a right of first refusal."[3] Miller offered Arp the opportunity to present the first offer. Arp offered the asking price minus about three percent, which Arp contended he was entitled to because he was representing himself. In connection with this offer, Arp stated that the letter of intent "meant nothing to him,"[4] had "no value,"[5]

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[1] At that time, Sean Murphy was not yet married to Corrie Murphy.

[2] Exhibit 23.

[3] Report of Proceedings (RP) (Jan. 15, 2008) at 51.

[4] RP (Jan. 16, 2008) at 281.

[5] Id.

and that he would sign a written waiver of any rights thereunder.

The Murphys received several other offers. Because the Arps' claim potentially affected title to the property, Miller disclosed the letter of intent to all prospective buyers. After giving the Arps an opportunity to meet the other bids, the Murphys accepted an offer for $26,000 over the asking price from Sharnmara Baldwin and Alfredo Estrada (the Buyers), conditioned upon the Arps' waiver of any interest in the property, to be obtained within two days.

The Arps refused to sign a waiver, putting the Murphys in breach. On June 27, the Murphys agreed to pay $350 toward the Buyers' expenses for an attorney to review the transaction and advise them whether to proceed.

Meanwhile, Pacific Northwest Title Company refused to insure title without an exception for the letter of intent. Insurance was not obtained until Sean Murphy's father, Peter Murphy, consented to indemnify the title company against the Arps' claim.

On June 26, 2006, and several times afterward, Benjamin Arp contacted agent Miller asking that she facilitate his contact with the Buyers. He faxed her a copy of the 2004 letter of intent together with a proposed new letter of intent for the Buyers' signatures. He asked that she forward the documents to the Buyers with his offer to sign the new letter in exchange for his waiver of the 2004 letter. Miller refused.

On June 27, 2006, the Arps contacted their attorney, who advised them that the 2004 letter was unenforceable and that they risked being sued if they tried to use it. At

some point the Murphys consulted legal counsel, and on June 29, 2006, an attorney for the Murphys called the Arps and threatened legal action if they continued to interfere with the sale. That same day, the Arps were sent a letter to the same effect, instructing them to stop trying to communicate with the Buyers.

The Arps responded in writing, again offering to waive the 2004 letter in exchange for the Buyers' agreement to sign a new one. Three days later, the Arps faxed the Buyers' agent, proposing that the Buyers sign a new letter of intent in exchange for nullification of the 2004 letter. They followed the fax with an e–mail on July 5. They provided a proposed new letter of intent, which was similar to the original but failed to state that it was not an enforceable agreement.

On July 6, the Murphys filed this lawsuit, claiming slander of title and tortious interference with a contractual relationship and asking the court to determine the enforceability of the 2004 letter of intent.[6] Meanwhile, the Buyers agreed to proceed, albeit with a financing contingency. The sale closed soon thereafter.

This suit remained pending, and the Arps counterclaimed for breach of contract and promissory estoppel. On summary judgment, the court held the 2004 letter of intent unenforceable and dismissed the counterclaims. After a trial on the other claims, the court ruled the Arps had slandered the Murphys' title. The court awarded $350 in damages and more than $150,000 in attorney fees and costs. As to the tortious interference claim, the court found that the Murphys proved all elements except damages, which it found too nominal ($350).

[6] The court allowed the Murphys to amend their complaint and add Peter Murphy as a co-plaintiff. Peter Murphy's claims were dismissed on the Arps' summary judgment motion and are not an issue on this appeal.

Both parties appeal.

ANALYSIS

Slander of Title

The Arps challenge several of the court's findings and conclusions . Where the trial court has weighed the evidence, appellate review is limited to determining whether substantial evidence supports the findings and if so, whether the findings support the conclusions of law and judgment.[7] Substantial evidence exists when there is a sufficient quantum of proof to support the findings of fact.[8] Even where the evidence conflicts, a reviewing court must determine only whether the evidence most favorable to the prevailing party supports the challenged findings.[9] Credibility determinations are for the trial court.[10]

The Arps challenge the finding that the parties were unable to secure adequate title insurance and that the title company listed the letter of intent as an exception to coverage. Donald Kirkland, president of Pacific Northwest Title, explained that his company requires an indemnification agreement when there is a potential defect in the title, and that a defect does not have to be recorded to qualify as such. The company initially issued a preliminary commitment for insurance, but after learning about the letter, it was listed as an exception to coverage, and the Buyers were ready to terminate the transaction. Thereafter, issuance was conditioned upon indemnification.

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[7] Ridgeview Props. v. Starbuck, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982).

[8] Org. to Preserve Agr. Lands v. Adams County, 128 Wn.2d 869, 882, 913 P.2d 793 (1996).

[9] State v. Black, 100 Wn.2d 793, 802, 676 P.2d 963 (1984).

[10] State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The finding was supported by substantial evidence.

The Arps next challenge the finding that they continued, even after the sale closed, to claim an interest in the Murphy property after three attorneys (including their own) had advised them that the letter was unenforceable and their conduct was risky. They contend Benjamin Arp withdrew his false statement soon after he made it. The Arps point to Benjamin Arp's statement that the letter "meant nothing to him,"[11] and argue they made no affirmative claim of enforceable interest thereafter.

But the trial court clearly did not believe them. Benjamin Arp's statement was not an unequivocal withdrawal of the purported claim, and his later conduct was inconsistent with a withdrawal. Arp reneged on his promise to sign a waiver of any interest arising from the letter.[12] Then the Arps wrote the Buyers' agent offering to forego their interest in the letter in exchange for the Buyers signing a new letter and declaring "[a]ll of us want to feel safe and have our interests protected."[13]

The Arps also expressed their desire to facilitate the sale by way of their proposed "new Letter of Intent to replace existing Letter of Intent," and their "belief that this issue could be handled amicably, quickly and in a manner that served the interest [of] all parties involved. In short, a win-win situation for everyone."[14] The Arps even offered the Buyers the "opportunity" to retain a right of perpetual use to the land they would agree to sell. Although Arp explained that the proposed letter of intent was only

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[11] RP (Jan. 16, 2008) at 281.

[12] Benjamin Arp testified that he said he would consider waiving the letter. However, a reviewing court must determine only whether the evidence most favorable to the prevailing party supports the challenged findings. Black, 100 Wn.2d at 802.

[13] Exhibit 5.

[14] Id.

a "template"[15] for future negotiations, the letter mirrored the 2004 letter with one significant exception: it lacked the nonlegally binding language. Even aside from his obvious credibility problems, nothing in this scenario amounts to a withdrawal of the Arps' specious claim of an interest in the Murphy property.

And finally, even after being sued, the Arps continued to assert their "interest." They filed a counterclaim for breach of contract based upon the letter, and Benjamin Arp claimed an interest in the Murphy property in his deposition.

Substantial evidence supports both the findings.

The Arps' other challenges to the findings are also meritless. Benjamin Arp testified that he understood his claims created a risk that the sale would not close, and that he intended his claims be relayed to prospective buyers. This evidence supports the findings that the Arps knew that their actions impaired the Murphys' title and placed the sale at risk, and that they.intended to interfere with the sale by coercing the Buyers into signing the proposed letter or by killing the deal.

The Arps contend the court erred in finding the Murphys had to bring this action to clear the title because by the time suit was filed, the sale was near closing and the Buyers were satisfied the letter was not enforceable. But near closing is not closed. The Arps' argument amounts to saying their claim did not cloud the title because it had no merit. They nevertheless continued to assert it. They contacted the Buyers by fax on June 30 and by e–mail on July 5. This action was filed on July 6.

The chronology speaks for itself. The controversy remained alive as long as the Arps continued to press their claims to the Murphy property. Further, the evidence is

[15] RP (Jan. 16, 2008) at 255.

that the title company prefers to eliminate an insured risk as soon as possible. Sean Murphy stated he would not have sued had Benjamin Arp signed the waiver. The Arps' refusal to waive their claims was the sole cause of this litigation.

The challenged findings are amply supported by the evidence.

The Arps contend these findings nonetheless do not amount to slander of title. "Slander of title is defined as (1) false words; (2) maliciously published; (3) with reference to some pending sale or purchase of property; (4) which go to defeat plaintiff's title; and (5) result in plaintiff's pecuniary loss."[16]

Relying on Patterson v. United Companies Lending Corp.,[17] the Arps argue that their refusal to sign a waiver of the 2004 letter does not, as a matter of law, amount to slander of title. In Patterson, a mortgagor forged the notarized quitclaim deed allegedly transferring the property from the plaintiffs to the mortgagor. Unaware of this, the mortgage company recorded the mortgage. In the true owners' suit for slander of title, the court granted summary dismissal, reasoning that the initial recording was the sole publication of false words and was made without malice, and that the subsequent failure to remove the mortgage could not support a slander of title claim because it was not a separate publication under Alabama's "single publication rule" in slander and libel actions.[18]

Patterson is inapposite. Here, the first publication (Arp's communication to Miller) was false and malicious and, contrary to the Arps' argument on appeal, the claim

[16] Rorvig v. Douglas, 123 Wn.2d 854, 859, 873 P.2d 492 (1994).

[17] 4 F. Supp. 2d 1349 (M.D. Ala. 1998).

[18] Patterson, 4 F. Supp. 2d at 1356–57.

was repeated, not withdrawn, ultimately becoming the basis of a counterclaim.[19]

The Arps also argue that the false statement was repeated by Murphy and Miller, not them, citing the rule that "the injured party cannot create his own cause of action by communicating the slanderous statements to others unless under strong compulsion to do so."[20] But the Arps wrote to the Buyers' agent knowing disclosure to third parties would be required by law,[21] and subsequently wrote repeatedly to the Buyers.

It is also irrelevant that the letter was not recorded. All that is required is that the false words be published; recording is only one means of publication.[22]

The publication of false words elements was satisfied.

The Arps next contend that the unrecorded and unenforceable letter of intent did not cloud the Murphys' title. The cloud derives not from the letter, however, but from the Arps' claims of an interest deriving from it. Knowing the letter was unenforceable, they nonetheless made it the centerpiece of a campaign to inject themselves into the

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[19] The Arps point out that assertion of the breach of contract counterclaim and statements made during litigation are absolutely immune and cannot form an independent basis for tort liability. See Kauzlarich v. Yarbrough, 105 Wn. App. 632, 641–42, 20 P.3d 946 (2001); Restatement (Second) of Torts § 635 illus. 3, 4 (1977) The assertions are nonetheless relevant to the issue of whether they withdrew their claim of interest.

[20] Belcher v. Little, 315 N.W.2d 734, 738 (Iowa 1982).

[21] RCW 64.06.020(1) requires sellers to disclose whether the property is subject to a first right of refusal, option, lease or rental agreement, or life estate.

[22] See Rorvig, 123 Wn.2d at 859; see also 50 Am. Jur.2d Libel & Slander § 532 (2008) (publication is essential; recording is an act of publication). See, e.g., Appel v. Burman, 159 Cal. App. 3d 1209, 1214–15, 206 Cal. Rptr. 259 (1984) (letters to public utility alleging false boundary were sufficient publications for slander of title claim); Cawrse v. Signal Oil Co., 164 Or. 666, 103 P.2d 729, 729–31 (1940) (false representations to oil companies alleging a lease on service station, causing companies to refuse to deliver gasoline, held sufficient to prove slander of title).

Murphy transaction.

In Robinson v. Khan,[23] this court was asked whether title to property was clouded by a recorded agreement providing that upon the sale of the property, the defendants were entitled to 15 percent of the net proceeds of the sale. We held it was, because a buyer would prefer to purchase without it, and because the recording had the potential to stand in the way of plaintiffs' exercise of their ownership rights.[24] We adopted the following definition:

> "A cloud upon a title is but an apparent defect in it. If the title, sole and absolute in fee, is really in the person moving against the cloud, the density of the cloud can make no difference in the right to have it removed. *Anything of this kind that has a tendency, even in a slight degree, to cast doubt upon the owner's title, and to stand in the way of a full and free exercise of his ownership, is . . . a cloud* upon his title which the law should recognize and remove."[25]

The Arps' claims clouded the Murphys' title. A right of first refusal or an option limits an owner's exercise of his or her ownership rights.[26] And the claims had the intended effect, creating numerous complications that jeopardized the sale. The fact the letter was not recorded is irrelevant. The Arps themselves published it to interested parties.

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[23] Robinson v. Khan, 89 Wn. App. 418, 948 P.2d 1347 (1998).

[24] Id. at 423–24.

[25] Id. at 423 (emphasis added) (quoting Whitney v. City of Port Huron, 88 Mich. 268, 272, 50 N.W. 316 (1891)).

[26] See Manufactured Housing Comtys. of Washington v. State, 142 Wn.2d 347, 364, 12 P.3d 183 (2000) ("'A right of first refusal to purchase is a valuable prerogative, limiting the owner's right to freely dispose of his property by compelling him to offer it first to the party who has the first right to buy.'") (quoting Northwest Television Club, Inc., v. Gross Seattle, Inc., 26 Wn. App. 111, 116, 612 P.2d 422 (1980)); Turner v. Gunderson, 60 Wn. App. 696, 700, 807 P.2d 370 (1991) ("'An option to purchase property is a contract wherein the owner, in return for a valuable consideration, agrees with another person that the latter shall have the privilege of buying the property within a specified time upon the terms and conditions expressed in the option.'") (quoting Whitworth v. Enitai Lumber Co., 36 Wn.2d 767, 770, 220 P.2d 328 (1950)).

The Arps also argue that for a claim of slander of title to succeed, the pending sale must fail. They contend no Washington court has upheld such a claim where the sale ultimately proceeded, and rely particularly on Clarkston Community Corp. v. Asotin County Port Dist.,[27] in which a slander of title claim was dismissed because there was no pending sale and the owner could show only an anticipation of negotiations.

There is nothing in Clarkston to support the contention that the only way a pending sale may be adversely affected is if it fails. On the contrary, under Clarkston as well as the more recent Supreme Court cases and the *Restatement*, all that is required is that the maliciously published false words reference a pending sale and result in plaintiff's pecuniary loss.[28] That is just what happened here.

Attorney Fees

Attorney fees incurred in removing the cloud from the title are necessary expenses of counteracting the effects of slander, and therefore recoverable in a slander of title claim as special damages.[29] [30]

The Arps contend the amount awarded was unreasonable "in light of the amount at issue."[31] The amount to which they refer is the $350 the Murphys paid to the Buyers

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[27] 3 Wn. App. 1, 4, 472 P.2d 558 (1970).

[28] See Rorvig, 123 Wn.2d at 859; Clarkston, 3 Wn. App. at 3–4; see also Restatement (Second) of Torts § 633(1) cmt. f (1977) ("A purchaser's reliance on a disparaging statement may not prevent him from buying the thing in question but it may make the price paid less than that which he had previously offered or than the value of the thing disparaged.").

[29] Rorvig, 123 Wn.2d at 862–63.

[30] The parties disagree as to whether Rorvig requires a finding that litigation was necessary to remove the cloud to the title as a condition of an award of fees. We need not decide this issue here because the court did so find and, as discussed above, its finding is supported by substantial evidence.

[31] Br. of Appellant at 34.

toward the cost of legal advice. The Arps thus describe the fee award as "four hundred times the amount of damages."[32]

The Arps focus upon the wrong question. The Murphys did not sue to recover their $350. They sued to clear title to the property. The Arps resisted to the end, even filing a counterclaim asserting their interest in the property was a matter of contract. That the Murphys managed to close the sale while this suit was pending does not immunize the Arps from responsibility.

The Arps do not challenge the hourly fee or the hours billed.[33] All the fees incurred were therefore properly awarded.

Tortious Interference with Contractual Relations or Business Expectancy

Murphy's claim of tortious interference required them to prove the existence of a valid contractual relationship or business expectancy known to the Arps; the Arps' intentional interference in that relationship for an improper purpose or by improper means, inducing or causing a breach or termination of the relationship or expectancy; and resulting damages.[34] The court concluded the Murphys proved all elements of this claim except damages. Specifically, the court found the Murphys incurred damages in the amount of the $350 they paid to the Buyers, but ruled that amount too nominal to satisfy the damages element. The Murphys contend this is error.

We agree. No case has held that a minimum amount of damages is required. Given our disposition, this issue is likely academic, but the court erred in rejecting the

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[32] Id.

[33] See Mayer v. City of Seattle, 102 Wn. App. 66, 82, 10 P.3d 408 (2000).

[34] Commodore v. Univ. Mech. Contractors, Inc., 120 Wn.2d 120, 137, 839 P.2d 314 (1992).

claim on this ground.[35]

Attorney Fees on Appeal

The Rorvig holding regarding the award of attorney fees as special damages in a slander of title case applies equally to the attorney fees incurred by the plaintiffs to defend an appeal. The Murphys are awarded their reasonable attorney fees on appeal.

Affirmed.

WE CONCUR:

[35] The Arps urge us to affirm on two alternative grounds. They first argue the Murphys incurred no damages because the $350 was offset by the fact that the Buyers paid more than the asking price. The Arps cite no authority in support of their argument, and its flaws need no enumeration. Next, the Arps characterize the $350 as attorney fees, which should not be awarded to the prevailing party on a tortious interference claim. The Arps are mistaken; the money was spent to reassure the Buyers and close the sale, not to litigate.